90-1311

No.

Supreme Court, U.S.
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In The Supreme Court of the United States October Term, 1990

THEODORE SMITH,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. The Circuits Have Inconsistently Interpreted The Exception Coined By This Court In Carey v. Piphus As To Both Scope And Damages Resulting In Unintended, Illogical, And Unfair Consequences Which Defeat The Very Rationale Of The Exception.

2. This Court Should Clarify Whether A Plaintiff Who Cannot Prove Actual Compensatory Damages Flowing From An Officer's Overt Misrepresentations Is Still Entitled To An Award Of Punitive Damages.

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THEODORE SMITH,

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The Petitioner Theodore Smith respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit entered in this proceeding on September 21, 1990.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit, affirming the district court's order dated February 22, 1989, was entered on the 21st day of September, 1990. A Petition for Rehearing was denied by the Seventh Circuit on November 16,

1990. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments to the Constitution of the United States appear in the appendix hereto.

STATEMENT OF THE CASE

At 5:00 p.m. on April 25, 1968, a woman named Shirley Johnson reported to the Chicago Police Department that she had been raped. (Case Report, Exhibit 1 to Record Item No. 84) Johnson was taken to Billings Hospital, where a rape test was performed. Upon examination it was found that *no semen* was present nor was there *any* sign of bruising or trauma. (Case Report, Exhibit 1 to Record Item No. 84) Appendix at 15a.

On April 28, 1968, Detectives Springer and O'Connell approached Petitioner and informed him that Johnson had accused him of rape. These officers also told Petitioner that unless he paid them some money, he would be arrested and charged with having raped Johnson. (Smith Affidavit, Exhibit 2 to Record Item No. 84) Petitioner had had prior dealings with Springer and O'Connell; earlier in 1968, Petitioner had paid these officers $220 to have an alleged battery charge dropped. (Smith Affidavit, Exhibit 2 to Record Item No. 84)

On May 7, 1968, Petitioner informed Springer and O'Connell that he was not going to pay the bribe. (Smith Affidavit, Exhibit 2 to Record Item No. 84) The next day, May 8, 1968, thirteen days after the alleged incident, Shirley Johnson swore out a complaint against Petitioner and the officers arrested Petitioner. (Supplemental Report, Exhibit 3 to Record Item No. 84)

On July 18, 1968 Petitioner appeared before Judge Daniel J. Ryan on a probable cause hearing. Judge Ryan specifically noted that there was sperm. After the police officer testified that sperm was found, the judge exclaimed "There's no question about it" and made a finding of probable cause.

THE COURT: I think she saw the man and one time was in the room, *plus sperm* and the immediate complaint and certain conditions. What do you know about this?

MR. EGAN: The officer had a conversation with the same witness that he offered to bring in.

POLICE OFFICER: I talked to him, if he heard any disturbance, he said "No". I questioned him as to Theodore Smith and his words to me were that he's a nut, they've been trying to get rid of him in the building.

MR. EGAN: What was the result of the medical?

POLICE OFFICER: *There was sperm.*

THE COURT: There's no question about it. Normally they're out together, but here's an accosted woman on the street, she never knew him before.

MR. DEFENSE COUNSEL: Your Honor, may I –

THE COURT: I'll hold it over. You could save your defense for later. The same bond to stand.

(Transcript 7/18/68 p.15) Appendix at 12a-13a.

Before Petitioner's trial in state court, his attorney was informed for the first time that a test purportedly conducted by the Chicago Police Crime Lab resulting in a positive finding of semen. (Crime Lab Report, Exhibit 4 to Record Item No. 84) Documents produced before the trial stated that the test had been performed at the Chicago Police Department Crime Lab on a vaginal swab which had been picked up from Billings Hospital on April 25, 1968 by Evidence Technician Chilla. (Chilla Report, Exhibit 5 to Record Item No. 84) Chilla's report stated that he had obtained the swab at Billings Hospital from a clerk named "R. Brown." (Chilla Report, Exhibit 5 to Record Item No. 84)

Petitioner was convicted of rape.[1] At Petitioner's state court trial, the Chicago Crime Lab results (positive for semen) and the Billings Hospital report (negative for semen, negative for bruising or trauma of any kind) were admitted into evidence.

After he had served his term of imprisonment, Petitioner conducted his own investigation. He discovered that the only person working at Billings Hospital on the pertinent date with the name "R. Brown" had never given the rape test swab or anything else to Chilla. (Short Appendix 15).

In his pro se civil rights complaint filed on May 18, 1979 (Record Item No. 1), Petitioner alleged that in 1968 Defendants had fabricated a police report and a Chicago Police Crime Lab report which found evidence of semen, which report was used to deprive Petitioner of federal rights. Petitioner alleged that he had first discovered the fabrication of evidence in 1976 after his release from jail. (Record Item No. 1 at 6) Defendants moved to dismiss, arguing, inter alia, that the case was barred by the statute of limitations. (Record Item No. 10) In his memorandum of April 15, 1981, Judge Grady held that the statute of limitations defense raised by defendants could not be resolved without an expansion of the record. (Short Appendix 2-4) Thereafter, in opinion filed on June 23, 1981, Judge Grady concluded that because of the complexity of the issues, counsel should be appointed for Petitioner. (Short Appendix 7)

In his memorandum opinion of December 22, 1981, Judge Grady denied the motion to dismiss of the individual police officers, noting that Petitioner's claim against these officers "in a nutshell, is that the officer fabricated evidence that was used to arrest, charge and convict plaintiff of rape."[2] (Short Appendix 11) The individual defendants had argued that Petitioner's claim was barred by collateral estoppel because Petitioner had an opportunity to litigate the claim on direct appeal from his conviction. (Short Appendix 11) Judge Grady disagreed (Short Appendix 12):

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[1] Petitioner's conviction was affirmed on direct appeal, *People v. Smith*, 8 Ill. App.3d 36, 288 N.E.2d 694 (1972).

[2] In the same order, the district court dismissed Petitioner's claims against the City of Chicago and former police superintendent Conlisk. (short Appendix 8-11)

> "Since plaintiff discovered the evidence after trial and appeal, he could not have litigated the issue at either of those proceeding. Moreover, where plaintiff's inability to fully and fairly litigate the issues of fabrication of evidence and perjury are due not merely to an alteration of circumstances beyond the parties' control, but to defendants' allegedly wrongful conduct, the application of collateral estoppel is especially inappropriate."

Following an evidentiary hearing on defendants' statute of limitations defense,[3] Judge Grady held that Petitioner's claims were not time barred. (Short Appendix 18) Petitioner filed an amended complaint (Record Item No. 68); shortly thereafter, defendants filed a motion for summary judgment. (Record Item No. 75)

In June of 1985, the case was transferred to Judge Williams. In a memorandum opinion dated February 6, 1987, Judge Williams denied the motion for summary judgment of defendants Springer, O'Connell and Chilla.[4] (Short Appendix 21-30) Thereafter, on Defendants' motion to reconsider, the district court held that because Petitioner had been released from custody, he could not maintain his damages action (Short Appendix 32-34)

On appeal, the Seventh Circuit Court of Appeals reversed, holding that Petitioner was not required to show that the fabricated evidence was the "but for" cause of his arrest or conviction:

> "Smith, therefore, can prevail is he shows that the defendants fabricated evidence leading to his false arrest and subsequent unreasonable seizure [citations omitted] causing him to suffer damages. Smith cannot be faulted for believing that without the fabricated evidence he would not have been incarcerated. The truth of this sentiment, however, is irrelevant to

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[3] The parties agreed to waive a jury determination on the limitations defense. (Short Appendix 6 n.1)

[4] At the request of Petitioner, the district court dismissed all claims against defendant Calbresa, Kelly and Downey. (Short Appendix 30)

Smith's section 1983 claim." *Smith v. City of Chicago,* 859 F.2d at 43.

On remand, Petitioner stated his damages claim as follows (Pre-Trial Order, Record Item No. 131):

> "Plaintiff seeks compensation for the emotional distress and economic loss he suffered as a result of defendants' wrongful acts. Specifically, plaintiff seeks compensation at the rate of $300 for each day that he was incarcerated and $10,000 per year thereafter."

Following submission of the pre-trial order, defendants moved *in limine* for an order "precluding Plaintiff from seeking damages related to his conviction and incarceration." (Short Appendix 36-38) Defendants relied on the Seventh Circuit's statement that Petitioner was not seeking "relief related to his conviction," 859 F.2d at 35, and argued that Petitioner cannot therefore "seek damages related to that conviction." (Short Appendix 37) Petitioner opposed this motion (Record Item No. 140) but the district court accepted defendants' arguments that Petitioner was limited to seeking nominal damages. (Short Appendix 43). Appendix at 17a.

Petitioner appealed and on September 21, 1990, the Seventh Circuit Court of Appeals affirmed the district court's judgment in favor of the Petitioner and the limitation of damages to the amount of $1.00. Appendix at 1a-10a. Petitioner filed a Petition for Rehearing which was denied on Nov. 16, 1990. Appendix at 11a.

REASONS FOR GRANTING THE WRIT

1. The Circuits Have Inconsistently Interpreted The Exception Coined By This Court In Carey v. Piphus Both as to Scope And Damages Resulting In Unintended, Illogical, And Unfair Consequences Which Defeat The Very Rationale Of The Exception.

The Seventh, Eighth, and Second circuits follow this court's ruling in *Carey v. Piphus,* 435 U.S. 247 (1978), that a constitutional deprivation would not allow the recovery of compensatory damages if the injured party could have or would have suffered

the same injury even if the alleged constitutional violation had not occurred. Based on *Carey*, the Seventh Circuit has held that the existence of *probable cause for an arrest* totally *precludes any section 1983 claim* for unlawful arrest, false imprisonment, or malicious prosecution, regardless of whether the defendants had malicious motives for arresting the plaintiff. *Mark v. Furay*, 769 F.2d 1266 (7th Cir. 1985)

However, the situation at bar falls within an exception that is recognized in *Carey*. The finding of probable cause by a judge cannot shield a police officer who *deliberately supplies misleading* information that *influences* the court's decision to issue a warrant. This exception has been applied, albeit inconsistently, in the First, Seventh, Eighth, Ninth, and DC circuits. *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981); *McLaughlin v. Alban*, 775 F.2d 389 (D.C. Cir. 1985).

The evidence in the instant case can only be interpreted to suggest that the defendants intentionally misled and misrepresented the facts of the case to the trial court which found probable cause. The finding of probable cause was secured by representations which were considerably less than full and candid. It appears from the comments of the judge who found probable cause that had he been fully and honestly informed by the defendants and had not been misled, it is doubtful that the arrest would have been authorized. Here the judicial officer making the probable cause determination was deprived of facts that were vital to his determination of probable cause.

It is hornbook law that a police officer who is objectively reasonable in seeking a finding of probable cause based on *truthful* and *complete* information is shielded from liability. But this standard does not fit a situation where a police officer *knowingly* fabricates evidence and conceals facts that *would negate* probable cause. *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121 (7th Cir. 1987).

If an officer undertakes to make decisions which are not his to make and then *intentionally misleads* those who do have the ultimate authority to authorize the arrest, that officer will

be found to have deprived the arrestee of his liberty without due process of law. *Whitley v. Seibel,* 613 F.2d 682 (7th Cir. 1980).

Where an officer is "constitutionally negligent," that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, liability will attach to his actions. *Briggs v. Malley,* 748 F.2d 715 (1st Cir. 1984).

Obviously a fabrication of evidence as in the case at bar in the course of an extortion attempt goes beyond the "should have known" standard in *Briggs.* If Petitioner would have been prosecuted even if the defendants had behaved properly, then they did not cause his injury and are not liable. *But* the evidence is that the defendants from the very origins of the investigation *fabricated evidence* in a bribery scheme, systematically *concealed from the court and misrepresented to it, facts highly material* to — that is, facts likely to influence — the decision whether to prosecute Petitioner and whether (that decision having been made) to continue prosecuting him right up to and into the trial. Indeed, Petitioner would never have been charged in the first place if the court had known the operative fact militating against his guilt, that upon refusal of his bribe the police officers fabricated evidence, and that the only rape test performed found no semen and no trauma.

On appeal, the Seventh Circuit agreed with the District Court that Defendants acted maliciously and violated Petitioners' rights, *yet* held that Petitioner was not entitled to anything other than $1.00 nominal damages. That court ruled that in order for a plaintiff in a section 1983 action to be entitled to any other damages for a violation of procedural due process, he must prove that the violation actually was the cause of his injury or deprivation. *Smith v. City of Chicago,* 913 F.2d 469 (7th Cir. 1990).

> "Thus, because probable cause existed for Smith's arrest and he would, thus, have been arrested in the absence of the defendants' alleged unconstitutional conduct, Smith has failed to suffer actual damages from the asserted constitutional deprivation, and his recovery was properly limited to nominal damages." *Smith, supra* at 474.

This ruling is inconsistent with the theory that liability attaches if the probable cause is based on a police officer's *intentional misrepresentation or concealment* of a material fact.

The denial of damages in such a case *completely nullifies* the force of a ruling that a defendant has acted in violation of one's constitutional rights. The rule cannot be enforced without an accompanying award of damages. Obviously, if officers acting in concert deliberately supply misleading and fabricated information in order to obtain a finding of probable cause for the purpose of extorting money, and a court finds this conduct to be in violation of an individual's constitutional rights, mere nominal damages are insufficient.

In order to settle the law and to give effect to the rule that an intentional misrepresentation in obtaining a finding of probable cause violates a defendant's constitutional rights, this Court must clarify what type of damages would be appropriate in such a situation.

Where this court has coined a wrong, it must provide a remedy for that wrong.

2. This Court Should Clarify Whether A Plaintiff Who Cannot Prove Actual Compensatory Damages Flowing From An Officer's Overt Misrepresentations Is Still Entitled To An Award Of Punitive Damages.

Punitive damages may be assessed in section 1983 actions "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1989); Smith v. Wade, 461 U.S. 30, 56 (1983).

This Court in *Carey v. Piphus* suggested that punitive damages might be awarded in a proper case under section 1983 with the specific purpose of deterring or punishing violations of constitutional rights. 435 U.S. at 257, n.11.

This suggestion has been followed in a number of circuits that hold that a plaintiff may recover nominal as well as punitive

damages *even if* a violation of his civil rights causes *no actual injury. Carey v. Piphus,* 435 U.S. 247 (1978); *Green v. McKaskle,* 788 F.2d 1116 (5th Cir. 1986); *Farrar v. Cain,* 756 F.2d 1148, 1152 (5th Cir. 1985); *Ustrak v. Fairman,* 781 F.2d 573, 581 (7th Cir. 1986); *Ganey v. Edwards,* 759 F.2d 337, 339 (4th Cir. 1985); *Madison County Jail Inmates v. Thompson,* 773 F.2d 834, 844 (7th Cir. 1985); *McCulloch v. Glasgow,* 620 F.2d 47 (5th Cir. 1980); *Mansell v. Saunders,* 372 F.2d 573 (5th Cir. 1967); *Brown v. Bullard Independent School District,* 640 F.2d 651 (5th Cir. 1981).

This rule should have been followed in the instant case. The officers' motive could not have been more evil; they did not receive the bribe they demanded so they fabricated evidence in order to obtain Petitioner's arrest and conviction. It is clear that Petitioner can show damages stemming from the officers' conduct. However, even if Petitioner was unable to show actual damages stemming from the officers' actions, this case clearly calls for an award of punitive damages under *Carey.*

CONCLUSION

For the above and foregoing reasons, Theodore Smith requests this Court to reverse the decision of the trial court below and to reverse the ruling by the Seventh Circuit which affirmed the trial court's decision.

Respectfully Submitted,

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APPENDIX

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In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1436

THEODORE SMITH,

Plaintiff-Appellant,

v.

CITY OF CHICAGO,
a Municipal Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 2038—**Nicholas J. Bua**, *Judge*.

ARGUED JANUARY 12, 1990—DECIDED SEPTEMBER 21, 1990

Before COFFEY, EASTERBROOK and MANION, *Circuit Judges*.

COFFEY, *Circuit Judge*. Theodore Smith appeals from a judgment in a civil rights action he brought under 42 U.S.C. § 1983 that limited him to recovery of nominal damages in the amount of $1 for an alleged unconstitutional arrest. The judgment was entered pursuant to a pre-trial agreement between Smith, the City of Chicago and individual defendants Jerry Springer, Richard O'Connell and Daniel Chilla, all officers or retired officers of the Chicago Police Department. The pre-trial agreement stipulated that Smith was to receive an award of $1 in

nominal damages from the City of Chicago. Further, the parties stipulated that there was no admission of liability on the part of the City or of the individual defendants, and Smith retained the right to file an appeal of the trial court's ruling on a motion *in limine* that had prevented him from seeking "relief for damages related to, or arising from, his criminal conviction," and had "limited [Smith] to seeking nominal damages."[1] We affirm.

I.

FACTS

This rape case arises from a woman's allegations that Theodore Smith sexually assaulted her on April 25, 1968. The woman reported the incident to the Chicago Police Department about 5 o'clock on that morning. According to a police report filed by two of the individual defendants, then Chicago Police Detectives O'Connell and Springer on May 26, 1968, the police officer who responded to the call was given a "service tag" the woman had obtained that listed Smith's name and the address where the rape allegedly occurred.[2] The officer took the woman to Billings Hospital where she was examined by a physician who, as was part of the examination, took a vaginal swab to ascertain the presence of semen, which proved negative.

According to his affidavit, defendant Daniel Chilla, then an evidence technician for the Chicago Police Department, stated that he was assigned to pick up the woman's vaginal swab sample from Billings Hospital on the morning of April 25, 1968. He further stated in his affidavit that he picked up the sample from an employee he noted at the time to be "R. Brown," although he had no present recollection of the employee's identity. However, Ralph Brown, an employee of the hospital, filed an affidavit stat-

[1] The agreement further provided that the City was to pay Smith's attorney $5,000 in attorneys' fees.

[2] The record does not explain the term "service tag."

ing that he did not give the vaginal swab of the rape victim to any Chicago police officer. Chilla's affidavit then states that he took the swab to the Chicago Police Department's Crime Laboratory. Joseph Price, a micro-analyst in the police laboratory, filed a report in the "Shirley Johnson Rape Investigation" dated April 26, 1968, that stated that he had received a "vaginal swab identified as having been taken from the victim at Billings Memorial Hospital," from Evidence Technician Chilla on April 26, 1968, and that "[m]icroscopic examinations of the [vaginal swab] revealed the presence of human spermatozoa . . . ."

On April 28, 1968, the victim went to a Chicago police station to view photographs of known sex offenders.[3] She identified a photograph of Theodore Smith as that of her attacker. The rape case was assigned to defendants Springer and O'Connell, Chicago police detectives, both of whom had prior contact with Smith. Smith asserts in an affidavit that he had paid these officers $110 as a bribe to fix a battery charge earlier in 1968. Smith also asserts that O'Connell and Springer confronted him on April 28, 1968, and told him that unless he paid the officers he would be arrested and charged with rape. Smith claims that he told Springer and O'Connell that he would not pay the bribe on May 7, 1968.[4]

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[3] None of the named defendants are alleged to have been involved in the picture identification.

[4] Although Smith contends that these facts are asserted in an affidavit attached to a response to summary judgment filed earlier in the case, our examination of this affidavit only reveals Smith's assertions concerning the bribe paid to the officers concerning the battery charge and does not contain the facts relevant to the alleged bribery for a coverup of the rape charge. In addition, both Springer and O'Connell have filed affidavits denying any contact with Smith from the time they were assigned to the case until Smith's first court appearance on May 11, 1968. However, this factual discrepancy is not dispositive and, for purposes of this decision, we will accept Smith's allegations concerning the officers' attempt to solicit a bribe as true.

On May 8, 1968, the rape victim signed a sworn complaint for preliminary examination stating that Smith had raped her on April 25, 1968. Springer and O'Connell then took the rape victim before Judge Daniel J. Ryan of the Cook County Circuit Court and the victim told Ryan that Smith raped her. The judge issued a warrant dated May 8, 1968, for Smith's arrest on the rape charge.[5]

Smith was convicted of rape in a bench trial in Illinois state court. At trial the victim testified that Smith raped her, while Smith testified that there had been an agreement between the victim and himself for a paid sexual encounter, that he became afraid, and that no sexual activity resulted. When testimony had concluded, Smith's attorney and the state's attorney agreed to the admission of both the negative vaginal swab test for sperm performed at Billings Hospital as well as the positive test performed in the police laboratory. In finding Smith guilty of rape, the state court judge appeared to rely solely upon a judgment concerning the credibility of the testimony that had been given by the rape victim and by Smith, stating:

> "In reviewing all this I—while the defendant was on the stand—I'm sorry about what his problem was, but four or five different places, even though they may be called small, he gave me the impression that I just couldn't believe him.
>
> "As I read the rape cases, it is easy to challenge and hard to prove and hard to defend against but immediately after leaving the place, she had a conversation with a roommate. Police came. They came to the same building. She saw pictures. Pointed him out. That was the man. Even though he was arrested some 12 or 13 days later.
>
> "I can see no reason why the young lady would say these things. I can see why he would say he didn't, because he's the defendant.

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[5] Smith was arrested by an Officer Reed who has not been named as a defendant.

> "Because of the discrepancies that I marked down, whether he was confused or not, I don't know about when he went to work, about when he went to the tavern, the difference in the amounts of money he offered her, the threatening, if there was the threatening, four or five difference discrepancies in his testimony—the other gentleman that testified for him admitted he heard nothing, didn't see anything except them walking down the street. Didn't know anything. Didn't hear what was said.
>
> "So, I think for those reasons there will be a finding of guilty. There will be a judgment on the finding."

In reaching his finding the judge mentioned neither the presence of sperm found in the police laboratory report nor the absence of sperm in the hospital laboratory report. Smith unsuccessfully challenged his convictions on direct appeal and in both state and federal habeas corpus proceedings.

After Smith was released from prison, he filed this suit under 42 U.S.C. § 1983 asserting that Springer, O'Connell and Chilla deprived him of his constitutional right to due process. Smith believed that the positive laboratory report concerning the presence of semen that the police had performed was fabricated because the police had not received a genuine vaginal swab of the rape victim. Smith based this belief initially upon his position that there was no employee of Billings Hospital in 1968 with the name of R. Brown and later upon his discovery that while there was such an employee, that employee did not furnish the vaginal swab sample to the Chicago Police Department.[6] The district court originally dismissed Smith's action on

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[6] Smith furnished the court with an affidavit of Ralph M. Brown that stated that a "policeman of the Chicago Police Department, to the best of my knowledge did not pick-up a test tub [sic] and a smear, taken by Dr. Young Rok Kim from the allege [sic] rape victim . . . from me at the University of Chicago Hospital and clinics."

the ground that it was an improper attempt to utilize 42 U.S.C. § 1983 to collaterally attack a state court conviction. However, we reversed that conclusion in *Smith v. Springer*, 859 F.2d 31, 34 (7th Cir. 1988), holding:

> "The defendants apparently read this complaint as stating that Smith can only prevail on his section 1983 claim if his conviction is invalid. This is not necessarily so. Smith need not legally attack the validity of his conviction to prevail on his section 1983 claim if he can prove that the defendant's misconduct injured him. The causation element of section 1983 requires only that the plaintiff prove that the defendant, acting 'under color' of law, caused the deprivation of his constitutional rights. 42 U.S.C. § 1983. Smith, therefore, can prevail if he shows that the defendants fabricated evidence leading to his false arrest and subsequent unreasonable seizure, *see, e.g., Olson v. Tyler*, 825 F.2d 1116 (7th Cir. 1987); *Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981) causing him to suffer damages."

We remanded Smith's case for further proceedings consistent with our opinion. *Id.* at 36.

After the case was remanded, the defendants filed a motion *in limine* seeking to bar recovery of "damages related to [Smith's] conviction and incarceration." As reflected in Smith's trial brief that was made part of the district court's pre-trial order, Smith believed that he was "entitled to compensatory damages for each day he was confined in the penitentiary as well as for lost earning opportunities caused by his felony conviction." The trial court granted the motion *in limine* holding that: "Plaintiff may not seek relief for damages related to, or arising from, his criminal conviction, and is limited to seeking nominal damages."

In light of the court's limitation on the damages Smith could be awarded, Smith, the individual defendants and the City of Chicago entered into an agreement that, without admission of fault on the part of the City or the individual defendants, judgment would be entered against the

City for nominal damages in the amount of $1. The City would also pay Smith's attorney fees in the amount of $5,000. Under the agreement, however, Smith maintained the right to appeal from the district court's order on the motion *in limine*, and the parties stipulated that if his appeal was successful, the individual defendants and the City could contest their liability in further proceedings in district court. The trial court entered a judgment order reflecting the parties' agreement and substituting the City of Chicago for the individual police officers as the defendant in this case.

II.

LIMITATION OF RECOVERY TO NOMINAL DAMAGES

Smith's appeal focuses on the propriety of the trial court's ruling on the City's motion *in limine* that precluded Smith from receiving damages related to his incarceration and loss of employment opportunities as a result of his criminal conviction and that limited Smith to nominal damages. Because any amount of recovery of compensatory damages would necessarily be in addition to the $1 in nominal damages that Smith received, the Court's determination that Smith could be awarded only nominal damages precludes any award of compensatory damages. Thus, we will turn initially to the potentially dispositive issue of whether the trial court properly limited Smith's recovery to nominal damages.

As we held in a previous decision in this matter, "Smith . . . can prevail if he shows that the defendants fabricated evidence leading to his false arrest and subsequent unreasonable seizure causing him to suffer damages." *Smith*, 859 F.2d at 34 (citations omitted). Thus, in order for Smith to recover compensatory damages, he must demonstrate that he suffered damages as a result of a constitutionally improper arrest.

In *Carey v. Piphus*, 435 U.S. 247, 260 (1978), the Supreme Court held that a constitutional deprivation would

not allow the recovery of compensatory damages if the injured party could or would have suffered the same injury even if the alleged constitutional violation had not occurred. The Court held:

> "In this case, the Court of Appeals held that if petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' 545 F.2d, at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. The court thought that in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the suspensions. The court suggested that in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. We do not understand the parties to disagree with this conclusion. Nor do we."

435 U.S. at 260 (citations and footnote omitted). Although compensatory damages could not be recovered for a constitutional violation, absent a demonstration of actual injury resulting from the constitutional violation, an award of nominal damages would still be appropriate:

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners."

Carey, 435 U.S. at 266-67 (citations and footnotes omitted).

In order to recover more than nominal damages, Smith must demonstrate that the fabricated evidence resulted

in an absence of probable cause for his arrest, meaning that he would not have been lawfully arrested in the absence of the fabricated evidence. Indeed, we have gone so far as to hold that there is not even a constitutional violation when there is a basis for a conclusion that probable cause supports a person's arrest:

> "Schertz's claim—that the investigating officers harbored malicious motives toward him—does not address an issue material to the disposition of this case. Regardless of the defendant's motives toward the plaintiff, the existence of probable cause for arrest is an absolute bar to a Section 1983 claim for unlawful arrest, false imprisonment, or malicious prosecution. If, however, the finding of probable cause is based on the defendant's intentional misrepresentation or concealment of material facts, the plaintiff may be able to proceed on a Fourth Amendment claim challenging the reasonableness of an arrest. In this case Schertz does not claim that the defendants concealed or misrepresented facts actually known to them; therefore the existence of probable cause bars plaintiff's Section 1983 claim."

Schertz v. Waupaca County, 875 F.2d 578, 582 (7th Cir. 1989) (citations omitted). *See also Olson v. Tyler*, 825 F.2d 1116, 1117 (7th Cir. 1987) ("In general, if probable cause supports an arrest warrant, an arrest pursuant to that warrant is valid even if events later prove the charges inaccurate . . . ."); *Mark v. Furay*, 769 F.2d 1266, 1268-69 ("This court has consistently held that the existence of probable cause for an arrest totally precludes any section 1983 claim for unlawful arrest, false imprisonment, or malicious prosecution, regardless of whether the defendant had malicious motives for arresting the plaintiff.").

Several factors in this case clearly establish probable cause. Initially the rape victim identified Smith from an array of photographs as the man who sexually assaulted her. The victim signed a sworn complaint alleging that Smith had raped her. Further, the victim also appeared in person before the judge and stated that Smith had raped

her. A warrant for Smith's arrest for the rape was issued and thereafter Smith was arrested. The combination of the victim's photo identification of Smith, her sworn complaint and her statement to the judge that Smith raped her certainly provide the probable cause necessary to justify Smith's arrest. Because the rape victim's identification of Smith as her attacker and her declarations in the criminal complaint clearly supported a probable cause determination, we are convinced that Smith would have been lawfully arrested for sexual assault even if the defendants had been involved in the falsification of the police laboratory report regarding the presence of sperm. Thus, because probable cause existed for Smith's arrest and he would, thus, have been arrested in the absence of the defendants' alleged unconstitutional conduct, Smith has failed to suffer actual damages from the asserted constitutional deprivation, and his recovery was properly limited to nominal damages. The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1990

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

THEODORE SMITH,
Plaintiff-Appellant,

No. 89-1436 v.

CITY OF CHICAGO,
a Municipal Corporation,
Defendant-Appellee.

Appeal from the United States District District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2038

Nicholas J. Bua,
Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATE OF ILLINOIS
COUNTY OF COOK SS:

THE MUNICIPAL COURT OF CHICAGO
First Municipal District
of
THE CIRCUIT COURT, COOK COUNTY, ILLINOIS

THE PEOPLE OF THE
STATE OF ILLINOIS
Plaintiff,

No. 68 MC CC 989984

vs.
THEODORE SMITH,
Defendant.

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Honorable DANIEL J. RYAN, Judge of said Court, this 18th day of July, A.D., 1968.

APPEARANCES:

HON. JOHN J. STAMOS,
State's Attorney, by
MR. JOHN EGAN,
Assistant State's Attorney,

appeared for the Plaintiff,

MR. DEFENSE COUNSEL,

appeared for the Defendant, Theodore Smith.

MR. DEFENSE COUNSEL: It doesn't come close to four hours.

THE COURT: I think she saw the man and one time was in the room, plus sperm and the immediate complaint and certain conditions. What do you know about this?

MR. EGAN: The officer had a conversation with the same witness that he offered to bring in.

POLICE OFFICER: I talked to him, if he heard any disturbance, he said, "No." I questioned him as to Theodore Smith and his words to me were that he's a nut, they've been trying to get rid of him in the building.

MR. EGAN: What was the result of the medical?

POLICE OFFICER: There was sperm.

THE COURT: There's no question about it. Normally, they're out together, but here's an accosted woman on the street, she never knew him before.

MR. DEFENSE COUNSEL: Your Honor, may I –

THE COURT: I'll hold it over. You could save your defense for later. The same bond to stand.

MR. EGAN: Counsel, keep him away from her.

STATE OF ILLINOIS

ss:

COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF ILLINOIS

Vs

Indictment No:
Charge: Rape

THEODORE SMITH

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE KENNETH R. WENDT, Judge of the said Court, on Monday, the 18th day of May A.D., 1970, 2:00 o'clock P.M.

APPEARANCES:

Same as before.

Q She didn't commit an act of oral copulation on you?

A I don't understand you.

Q She didn't put her mouth on your penis.

A No.

MR. SAVAGE: That's all.

THE COURT: Anything else?

RECROSS EXAMINATION
BY MR. BOBACK:

Q But that's what you were paying the $19 for.

A For what?

Q Oral copulation and sexual intercourse.

A No, sir.

Q Nothing?

A No sir.

MR. BOBACK: That's all.

THE COURT: Call your next, Mr. Savage.

MR. SAVAGE: The defendant, your Honor, will not call any further witnesses.

THE COURT: You what, sir?

MR. SAVAGE: The defendant will not call any further witnesses. I would like, however, at this time to offer into evidence pursuant to stipulation of the State's Attorny, photographic copy of medical reports of the University of Chicago Hospital and Clinic relating to Shirley Johnson and indicating on one page thereof that she was examined by a Doctor Young Rok Kim at 5:00 in the morning of April 25, 1968; that he ran tests and smears of her pelvic regions among other things, discovered that her external genitalia was normal, and there was negative any bruises or any trauma of any kind; that her vagina was clean and that the vaginal smear that — that he gave her proved negative for any spermatozoa.

I'd like, if I may, to have this marked as Defendant's Exhibit 1.

(Whereupon, the item was marked DX1 I.D.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THEODORE SMITH,
Plaintiff,

vs.

No. 79 C 2038
(JUDGE BUA)

JERRY SPRINGER, et al.,
Defendant.

O R D E R

THIS MATTER coming before the Court on Defendants' Motion in Limine Regarding Plaintiff's Claim for Damages Related to His Criminal Conviction, the Court having considered the memoranda submitted by counsel.

IT IS HEREBY ORDERED:

(1) Defendants' Motion in Limine is granted.

(2) Plaintiff may not seek relief for damages related to, or arising from, his criminal conviction, and is limited to seeking nominal damages.

ENTER: /s/ NICHOLAS J. BUA
NICHOLAS J. BUA
Judge, United States District Court

DATED: February 13, 1989

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

No. 90-1311

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THEODORE SMITH,
Petitioner,
v.
CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff in an action brought under 42 U.S.C. § 1983 is limited to the recovery of nominal damages for an alleged unconstitutional arrest where:

(a) the arresting officers allegedly fabricated evidence against the plaintiff but probable cause for the arrest existed independently of the disputed evidence, and

(b) the plaintiff did not argue for punitive damages in either of his two appeals, instead claiming only that he was entitled to compensatory damages.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1311

THEODORE SMITH,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 913 F.2d 469 and is reprinted at Pet. App. 1a-10a.

The opinion and order of the United States District Court for the Northern District of Illinois (Bua, D.J.) dated February 22, 1989, have not been reported. They are reprinted in the appendix to this brief at 1a-4a. A copy of the district court's order of February 13, 1989 (ruling on the motion in limine), is reprinted at Pet. App. 16a.

An earlier opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported at 859 F.2d 31.

STATEMENT

On April 25, 1968, Shirley Johnson reported to the Chicago Police Department that she had been raped. R. Item 155, Trial Tr. May 18, 1970, at 30, 54. The police took Johnson to Billings Hospital where she was examined by a physician. *Id.*; R. Item 21, Ex. E. As part of the examination, a vaginal swab was prepared to ascertain the presence of semen; no semen was found. R. Item 21, Ex. A.

Approximately three hours after Johnson was examined, Police Officer Chilla went to Billings Hospital and picked up a sample of the vaginal swab taken from Johnson. R. Item 86, Ex. 1-A (Chilla affidavit). Chilla took the sample to the Chicago Police Department's Crime Laboratory where it was tested on April 26, 1968, for the presence of semen; the test revealed that semen was present. R. Item 37, Ex. E-1.

Between April 25 and April 28, 1968, detectives Cole and Downey of the Chicago Police Department went to petitioner Theodore Smith's residence on two occasions but were unable to gain entry. R. Item 37, Ex. J-1. Three days after the rape, on April 28, 1968, Johnson went to Area 2 police headquarters to view photographs of known sex offenders; the photograph of the person she identified as her attacker was that of petitioner Smith. R. Items 37, Ex. J-1; 155, Trial Tr. May 18, 1970, at 55-59.

The case was reassigned to Police Officers Richard O'Connell and Jerry Springer because they knew Smith. R. Item 37, Ex. J-1. In the days that followed, O'Connell and Springer tried unsuccessfully to locate Smith. *Id.*

On May 8, 1968, Johnson signed a complaint alleging that Smith had raped her on April 25, 1968. R. Item 37, Ex. I-1. A warrant was issued based on the complaint and on the victim's statements to the judge who was asked to issue the warrant. R. Items 37, Ex. J-1; 131,

Final Pretrial Order, Stipulation of Uncontested Facts at 5. On May 12, 1968, the police learned that Smith was working at the Ascot Motel. *Id.* Police Officer Reed, who was never a defendant in this case, arrested Smith later that day. *Id.* Smith posted bond and was released. R. Item 131 at 5.

The case went to trial before a judge on May 18, 1970. R. Item 155, Trial Tr. May 18, 1970. Johnson testified that Smith had raped her. *Id.* at 29-118. Smith also testified and denied raping Johnson. According to Smith, he and Johnson agreed to a paid sexual encounter; however, the agreement went "sour," and Smith stated that no sexual activity of any kind occurred. *Id.* at 168-69; 178-80. At the end of all testimony, the state's attorney and counsel for Smith stipulated to the admission of the results of the tests performed on both samples taken from the vaginal swab. *Id.* at 213-16. At the conclusion of trial, the court found the defendant guilty, relying solely on the testimony of Johnson and Smith.[1] *Id.* at 218-19.

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[1] In announcing judgment against Smith the court stated:

> In reviewing all this I—while the defendant was on the stand—I'm sorry about what his problem was, but four or five different places, even though they may be called small, he gave me the impression that I just couldn't believe him.
>
> As I read the rape cases, it is easy to challenge and hard to prove and hard to defend against but immediately after leaving the place, she had a conversation with the roommate. Police came. They went to the same building. She saw pictures. Pointed him out. That was the man. Even though he was arrested some twelve or thirteen days later.
>
> I can see no reason why the young lady would say these things. I can see why he would say he didn't, because he's the defendant.
>
> Because of the discrepancies that I have marked down, whether he was confused or not, I don't know about when he went to work, about when he went to the tavern, the difference in the amount of monies he offered here, the threatening, if there was the threatening, four or five different discrepancies in his testimony—the other gentleman that testified for him admitted he

Smith's conviction was affirmed on direct review. *People v. Smith*, 8 Ill. App. 3d 36, 288 N.E.2d 694 (1972). Smith was unsuccessful in obtaining either state or federal collateral relief. *People v. Smith*, 56 Ill. App. 3d 569, 371 N.E.2d 921 (1977); R. Item 75 (order denying federal writ of habeas corpus).

Smith filed his original complaint in this action pro se on May 10, 1979, under 42 U.S.C. § 1983. R. Item 1. He named as defendants the City of Chicago; James B. Conlisk, then Superintendent of Police; and City of Chicago Police Officers Springer, O'Connell, and Calabrese. Smith's complaint alleged that he was convicted of rape based, in part, on evidence manufactured by the defendant police officers. R. Item 1. The specific evidence allegedly fabricated was a sample of the vaginal swab taken from the rape victim and tested by the police department's crime laboratory. R. Item 1 at 2. Smith alleged that the sample from the swab tested at Billings Hospital, the treating hospital, did not reveal the presence of semen, while the sample tested by the city's crime laboratory did. *Id.* at 6. Smith further alleged that the fabricated evidence was used against him at trial because he failed to pay a "bribe" of $500 to defendants Springer and O'Connell. *Id.* at 9. Smith sought damages for deprivation of liberty, deprivation of due process, and denial of his right to equal protection of the law. *Id.* at 5, 7, 11, 12.

In July 1981, the district court appointed counsel to represent Smith. On December 22, 1981, the court granted a motion to dismiss the City of Chicago and Superintendent Conlisk from the action. R. Item 51. The remaining defendants' motions to dismiss on grounds of

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heard nothing, didn't see anything except them walking down the street. Didn't know anything. Didn't hear what was said. So, I think for those reasons there will be a finding of guilty. There will be a judgment on the finding.

R. Item 155, Trial Tr. May 18, 1970, at 218-19.

collateral estoppel and the statute of limitations were denied. R. Items 51, 67. Smith's motion to file an amended complaint was granted, R. Item 67, and his counsel filed an amended complaint on November 5, 1984, naming as defendants Chicago Police Officers Jerry Springer, Richard O'Connell, Ralph Calabrese, Daniel Chilla, Police Detectives Cole and Downey, and Police Sergeant Kelly. R. Item 68. Detective Cole died during the pendency of the action, R. Item 96, and Smith later dismissed defendants Calabrese, Downey, and Kelley. R. Items 95, 96.

On February 6, 1987, the district court dismissed the case. Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, which reversed and remanded for trial. *Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988) (*Smith I*).

On remand, after the parties had filed briefs describing what they expected to prove at trial, the district court granted the defendants' motion in limine, which barred Smith from seeking "relief for damages related to, or arising from, his criminal conviction." R. Item 146; Pet. App. 16a. On February 22, 1989, the parties agreed to substitute the City of Chicago for the remaining defendants (Springer, O'Connell, and Chilla) and further agreed to entry of judgment for the plaintiff for nominal damages plus $5,000 in attorney's fees. The parties also agreed that the judgment would neither constitute an admission of liability on the part of the defendants nor preclude the plaintiff from appealing the district court's granting of defendants' motion in limine. R. Items 148, 149, 150. Smith appealed. On September 21, 1990, the Seventh Circuit affirmed the district court's order of February 22, 1989. *Smith v. City of Chicago*, 913 F.2d 469 (Pet. App. 1a-10a (*Smith II*)). The Seventh Circuit denied Smith's petition for rehearing on November 16, 1990.

ARGUMENT

THE SEVENTH CIRCUIT'S DECISION THAT SMITH WAS ENTITLED TO ONLY NOMINAL DAMAGES IS CONSISTENT WITH THIS COURT'S CASES AND THE LAW OF OTHER CIRCUITS.

The Seventh Circuit held in this case that petitioner was entitled to only nominal damages on his claim under 42 U.S.C. § 1983 that he had been deprived of liberty without due process as a result of the alleged fabrication of a police laboratory report used in the state's successful prosecution of Smith for rape. Pet. App. 5a.[2] The court concluded that since Smith's arrest was based upon probable cause independent of the allegedly fabricated report (the victim's identification of Smith as the rapist and a valid arrest warrant), that report did not cause him any actual damages. *Id.* at 10a. Having held in an earlier appeal that Smith could not collaterally attack the propriety of his subsequent conviction and incarceration in this section 1983 action, a ruling Smith does not challenge, the court below held that Smith was limited to the recovery of nominal damages because he would have been arrested whether or not the defendants fabricated a laboratory report. *Id.*

Smith has sought review by this Court, claiming (Pet. at 7-8) that the Seventh Circuit's decision conflicts with *Carey v. Piphus*, 435 U.S. 247 (1978), and with cases in other circuits interpreting *Carey*. This claim is meritless and, as shown below, the Seventh Circuit correctly applied settled law to the facts of this case.

A. The district court's ruling on nominal damages in this case was made on remand from the Seventh Circuit's decision in *Smith I*. In *Smith I*, the Seventh Circuit held that the plaintiff would be entitled to damages arising from the defendants' alleged fabrication of evidence but

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[2] As discussed *infra* at 10-11, Smith did not argue in either of his appeals that he was entitled to punitive damages.

only if he could prove "that the defendants fabricated evidence leading to his false arrest and subsequent unreasonable seizure, *see, e.g., Olson v. Tyler*, 825 F.2d 1116 (7th Cir. 1987); *Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981), causing him to suffer damage." 859 F.2d at 34.

The "subsequent unreasonable seizure" to which *Smith I* referred is the loss of liberty caused by Smith's arrest. This is made plain by the two cases cited in support of the holding, *Olson* and *Bohannon*, both of which held that damages are available for false arrest and the false imprisonment necessarily stemming from the false arrest. Thus, under *Smith I*, Smith was required to link the alleged fabricated evidence to a false arrest and then to a specific injury resulting from the false arrest. *Smith I*, 859 F.2d at 34. If, however, the arrest had a valid basis quite apart from the fabricated evidence, Smith could not recover more than nominal damages. In other words, under *Smith I*, Smith was entitled to more than nominal damages only if he would not have been arrested but for the defendants' alleged improper conduct in manufacturing the sample that tested positive for semen. As the district court found on remand, Smith could not make this showing, and thus as a matter of law he was not entitled to more than nominal damages.[3]

The record shows that there was an independent and lawful basis for Smith's arrest. On April 28, 1968, three days after the rape, Johnson went to Area 2 police headquarters, viewed pictures of known sex offenders, and picked out Smith as the man who raped her. R. Item 155, Trial Tr. May 18, 1970, at 55-59. On the strength of that identification alone, the police had probable cause to

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[3] It may have been possible for Smith to show some injury, apart from his incarceration, flowing separately from the fact that evidence was manufactured. If so, he might have been able to recover for that injury. On remand from *Smith I*, however, Smith chose not to introduce evidence of any element of such a claim.

arrest Smith. *See United States v. Anderson*, 533 F.2d 1210, 1213 (D.C. Cir. 1976) (probable cause to arrest based on identification of perpetrator by victim); *see also United States ex rel. Burbank v. Warden, Illinois State Penitentiary*, 535 F.2d 361, 365-66 (7th Cir. 1976) (probable cause to arrest based on identification of perpetrator by eyewitness), *cert. denied*, 429 U.S. 1045 (1977).

The victim also executed a complaint, alleging that Smith raped her. R. Item 37, Ex. I-1. It is well settled that Johnson's complaint provided probable cause to arrest Smith. *See Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 200 (7th Cir. 1985); *McKinney v. George*, 726 F.2d 1183, 1187 (7th Cir. 1984). The police took the complaint and Johnson before a judge, who issued a warrant for Smith's arrest after reviewing the complaint and hearing from the victim herself. R. Item 131, Final Pretrial Order, Statement of Stipulated Uncontested Facts at 5. Smith was arrested on the basis of this warrant by an officer who has never been a party to this case. R. Item 37, Ex. J-1. Clearly Smith's arrest was valid. And an arrest that would have occurred despite police misconduct cannot, as a matter of law, give rise to a claim for damages.

The opinion below, far from conflicting with *Carey v. Piphus*, 435 U.S. 247 (1978), rather depends upon *Carey* as its logical underpinning. In *Carey*, this Court held that damages for deprivation of civil rights should not be presumed "and that plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions." *Id.* at 262. Without proof of actual injury, the Court held that plaintiffs could recover only nominal damages, *id.* at 266, like the damages awarded to Smith in this case. The Court reached this conclusion based upon "the basic purpose of a § 1983 damages award," which is "to compensate persons for injuries caused by the deprivation of constitutional rights." *Id.* at 254. This Court has reaffirmed the principle from *Carey* that a

plaintiff could recover only nominal damages where he suffered no actual injury. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986). In *Stachura*, the Court explained *Carey* as holding that "[w]here no injury was present, no 'compensatory' damages could be awarded." *Id.* at 308. If no unlawful arrest or other discrete injury flowed from the fabrication of evidence in this case, there is no claim for damages under these precedents.[4]

Smith also claims that the opinion below conflicts with *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). A claimed intracircuit conflict does not merit review in this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974). In any event, there is no conflict with *Jones*. In *Jones*, the court found that Jones' arrest was based on fabricated evidence. The state's subsequent prosecution of Jones for murder had been dropped and thus he had never been convicted of or sentenced for that murder. 856 F.2d at 991. There was a clear causal link between the defendants' unconstitutional misconduct and the plaintiff's false arrest, false imprisonment, and malicious prosecution. In this case, by contrast, Smith had

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[4] The cases that Smith cites as recognizing an exception to the damages principle announced in *Carey* do not concern the measure of damages recoverable in a section 1983 action, but rather concern the standard for qualified immunity in a case alleging that a police officer presented misleading information in applying for an arrest warrant. *See Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987); *McLaughlin v. Alban*, 775 F.2d 389 (D.C. Cir. 1985); *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986); *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982). That standard is "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Qualified immunity was not at issue in either of the *Smith* appeals. Instead, the issue in both appeals was what measure of damages applied assuming that the police officers had fabricated the laboratory report as Smith alleged.

been arrested, charged with rape, tried, convicted, had served his sentence, and did not challenge his conviction. *Smith I*, 859 F.2d at 33-34. Because Smith did not challenge his conviction, and, indeed, could not collaterally attack it under settled section 1983 law, *see, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973), he could obtain damages only by showing that the fabricated evidence caused his false arrest, which the courts below found he could not show. Moreover, his conviction, like his arrest, was based on the victim's testimony and not the allegedly fabricated evidence.

The record in this case and the record of the criminal prosecution preclude Smith from recovering more than nominal damages. Smith was arrested, tried, and convicted of rape based upon the victim's consistent testimony against him. Smith ignores the valid basis of his arrest. He cites no authority that even remotely suggests that a person who would have been arrested anyway, notwithstanding police misconduct, can recover compensatory damages based solely on that misconduct. To the contrary, it is settled that false information gives rise to a Fourth Amendment claim only if it is the but-for cause of the search or seizure. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Smith's "position" would have been the same with or without the allegedly manufactured evidence; he would have been arrested on the basis of the victim's positive identification, her signed complaint, her statements to the judge, and the arrest warrant. The decision below correctly applied the principles announced in *Carey* and *Stachura* to the facts of this case. *Smith I* made any recovery of more than nominal damages contingent upon a factual showing that the Seventh Circuit subsequently found in *Smith II* had not been made. The decision below is consistent with this Court's cases and with the other cases cited by Smith.

B. Smith's remaining claim, that he is entitled to punitive damages, does not merit review in this Court.

Smith offered no argument that he was entitled to punitive damages in the district court or in either of his two appeals to the Seventh Circuit. Thus none of the opinions in this case considered that issue. This Court should not review a question that was never briefed or argued below. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).[5]

In any event, Smith agreed to the substitution of the City of Chicago for the other defendants in this case. *See* R. Items 148, 149, 150. Punitive damages may not be recovered under section 1983 against a municipality, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), which is the only respondent in this case. For this reason as well Smith's petition should be denied.

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[5] Smith has essentially admitted that a claim for punitive damages was not pressed below. He is currently involved in malpractice litigation against his trial counsel in this case, claiming among other things, that "plaintiff's attorney could have sought punitive damages if he had chosen to." Plaintiff's Reply Answer to the Defendants' Motion to Dismiss, No. 91-C-0029 (N.D. Ill.).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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May 23, 1991

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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79 C 2038

JUDGE BUA

Date February 21, 1989

THEODORE SMITH

v.

JERRY SPRINGER *et al*

MINUTE ORDER FORM

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

The City of Chicago is substituted as defendant in place of the individual defendants. Judgment is entered in favor of plaintiff and against City of Chicago in the amount of $1, plus attorneys' fees and costs in favor of attorney Kenneth N. Flaxman in the sum of $5,000.

* * * *

(For further detail see order attached to the original minute order form.)

/s/ AH
February 22, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2038

JUDGE BUA

THEODORE SMITH,

Plaintiff,

vs.

JERRY SPRINGER, RICHARD O'CONNELL
and DANIEL CHILLA,

Defendants.

JUDGMENT ORDER

[Docketed Feb. 22, 1989]

THIS MATTER coming to be heard for trial and upon Defendants' Motion in Limine Regarding Plaintiff's Claim For Damages Related to His Criminal Conviction, the parties and their attorneys being present in open Court on February 13, 1989, with trial scheduled to commence on that day, and the Court being otherwise fully advised in the premises, the Court FINDS as follows:

1. On February 13, 1989, the Court granted Defendants' Motion in Limine Regarding Plaintiff's Claim For Damages Related to His Criminal Conviction, holding that Plaintiff may not seek relief for damages related to, or arising from, his criminal conviction. Because Plaintiff sought no other relief, the Court further held that Plaintiff is limited to seeking nominal damages.

2. In light of the Court's ruling, the parties agreed that Defendants would consent to entry of judgment against their indemnifier, the City of Chicago, and in

favor of Plaintiff in the amount of One Dollar ($1.00). The parties agreed further that entry of such a consent judgment would not constitute an admission of liability on the part of the individual Defendants or the City of Chicago; neither would entry of such a consent judgment preclude Plaintiff from appealing this Court's ruling on Defendants' Motion in Limine. The parties further agreed that if the Seventh Circuit Court of Appeals determines that it does not have jurisdiction to hear or decide such an appeal, then this consent judgment may be vacated pursuant to Fed. R. Civ. P. 60(b) and the case set for trial. The parties agree that this Court may reserve jurisdiction for that purpose.

3. It was further agreed between the parties that a judgment for attorneys fees would be entered against the City of Chicago in an amount to be set by the Court, but not to exceed Five Thousand Dollars ($5,000.00).

4. In the interest of judicial economy, the Court approved the agreement between the parties, and directed counsel to submit the appropriate Stipulation and proposed Judgment Order on February 14, 1989.

5. Before approving the above-described agreement, the Court personally verified, in open court, that Plaintiff Theodore Smith had authorized his court-appointed attorney to enter into such an agreement and that Plaintiff found such an agreement to be acceptable in light of the Court's ruling on Defendants' Motion in Limine.

6. The Court was prepared to try this case commencing on February 13, 1989, and a jury venire was assembled in court for that purpose. The venire was released upon the Court's approval of the agreement among the parties.

7. Having reviewed the Petition for Fees submitted by Kenneth N. Flaxman, the Court finds that an award of attorneys fees and costs in the amount of Five Thousand Dollars ($5,000.00) to be paid by the City of Chicago to

Kenneth N. Flaxman is reasonable under all the circumstances of this case.

Based upon the above findings, IT IS HEREBY ORDERED as follows:

(a) Judgment is entered against the City of Chicago and in favor of Plaintiff Theodore Smith in the total amount of One Dollar ($1.00).

(b) Said judgment does not constitute an admission or finding of liability on the part of the City of Chicago or Defendants Jerry Springer, Richard O'Connell and Daniel Chilla, and does not preclude them from contesting liability to Plaintiff in the event that the judgment is reversed by an appellate tribunal.

(c) Judgment for attorneys fees and costs is entered against the City of Chicago and in favor of attorney Kenneth N. Flaxman in the total amount of Five Thousand Dollars ($5,000.00). Said judgment for attorneys fees and costs constitutes a final settlement of all fees and costs accrued to date.

ENTER:

/s/ Nicholas J. Bua
NICHOLAS J. BUA
Judge
United States District Court

Dated 2/21/89

(1) THESMITH.ORD